

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY D. ELSTER,

No. C 04-2383 WHA (PR)

Petitioner,

**DENIAL OF CERTIFICATE OF
APPEALABILITY**

v.

JILL BROWN, Warden,

Respondent.

This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. The petition was denied in a ruling entered on September 27, 2006. On October 19, 2006, he filed a notice of appeal and a motion for leave to proceed in forma pauperis on appeal. Although he does not request a certificate of appealability, the notice of appeal will be deemed a request for the certificate. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability (formerly known as a certificate of probable cause to appeal). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate which issues satisfy this standard. *See id.* § 2253(c)(3).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable

1 jurists would find the district court's assessment of the constitutional claims debatable or
2 wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000).

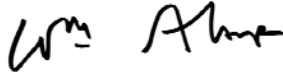
3 The petition was denied because there were a number of factors in addition to the nature
4 of the offense to support the denied of parole – for instance, petitioner had been convicted of
5 manufacturing and possessing a weapon while in prison. Reasonable jurists would not find the
6 result here debatable or wrong. The certificate of appealability implied from the notice of
7 appeal is **DENIED**. Petitioner's motion to proceed in forma pauperis on appeal (document
8 number 18) is **DENIED**.

9 The clerk shall transmit the file, including a copy of this order, to the Court of Appeals.
10 See Fed. R.App.P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

11 Petitioner may then ask the Court of Appeals to issue the certificate, see R.App.P. 22(b)(1), or if
12 he does not, the notice of appeal will be construed as such a request, see R.App.P. 22(b)(2). He
13 may also ask the court of appeals to permit him to proceed IFP on appeal.

14
15 **IT IS SO ORDERED.**

16
17 Dated: October 25, 2006.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE